BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA

In the Matter of: SOUTH BAY SAND BLASTING AND TANK CLEANING, INC. (4 TTUs: SBSB-1, SBSB-4, SBSB-5, SBSB-6) 3763 Dalbergia Street San Diego, California 92113 ID No. CAL 000 827 900, Respondent.	Docket No. HWCA 20040509 OAH No. 2005030407

DECISION

The attached Proposed Decision of the Administrative Law Judge is herby adopted by the Department of Toxic Substances Control as its Decision in the above-entitled matter.

This Decision shall become effective on June 14, 2005.

IT IS SO ORDERED THIS 14 day of June, 2005.

Original signed by B.B. Blevins
B.B. Blevins
Director

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PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on April 21, 2005.

The Department of Toxic Substances Control was represented by Robert Olken, Senior Staff Counsel.

Respondent South Bay Sand Blasting and Tank Cleaning, Inc., was represented by its vice president and general manager, Roger S. Gruben.

The matter was submitted for decision on April 21, 2005.

FACTUAL FINDINGS

Procedural Background

1. Pursuant to Health and Safety Code section 25187, the Department of Toxic Substances Control may issue an enforcement order for corrective action and may assess a penalty when it determines that any person has violated specified provisions of the Health and Safety Code or of any permit, rule, regulation, standard, or requirement issued or adopted pursuant to those provisions.

2. Pursuant to title 22, California Code of Regulations, section 67450.1, permits are required for the treatment of hazardous waste using a Transportable Treatment Unit (TTU). To obtain a "permit by rule," the owner or operator of a TTU must submit an initial unit-specific "notification" to the department that includes, among other things, identification of the waste types to be treated and the treatment processes to be used.[1] The holder of a permit by rule must then submit to the department both annual unit-specific notifications as well as site-specific notifications for each site where the TTU will perform treatment.[2] Among other requirements, the holder of a permit by rule must comply with specific requirements concerning closure of the TTU.[3] One of those requirements is that the permit holder must submit to the department a certification signed by the permit holder and by a registered professional engineer that closure has been completed in accordance with a written closure plan that meets the applicable requirements.[4]

3. On January 18, 2005, the department issued an enforcement order (Docket HWCA 20040509) to respondent South Bay Sand Blasting and Tank Cleaning, Inc., alleging that respondent had violated title 22, California Code of Regulations, section 67450.3, subdivision (a)(13)(G), by failing to submit a certification that TTUs had been closed in accordance with the applicable regulatory requirements. The enforcement order imposed an administrative penalty of $54,000. Respondent has appealed.

Findings re: Alleged Violations

4. Acting as a subcontractor to three of the United States Navy's ship repair contractors – NASSCO, Southwest Marine, and Continental Marine – respondent performs activities such as sandblasting and coating steel and aluminum structures, cleaning ships' tanks, and maintaining ships' bilges during overhauls. In performing these last two functions, respondent removes oily water from ships' bilges and transports it to a disposal site. This is the only hazardous waste respondent handles.

5. In 1993, respondent submitted to the department an initial unit-specific notification for a TTU designated as SBSB-1. The notification listed three types of treatment processes that would be used: filtration, flocculation, and sedimentation. In March 1995, respondent submitted another unit-specific notification for SBSB-1. Respondent listed the treatment processes to be used as: phase separation, gravity settling, pH adjustment, filtration, and "physical process." Respondent attached to that notification a document signed by Alex Williams, respondent's environmental manager, entitled "TTU Description." It read as follows:

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[1] Title 22, California Code of Regulations, section 67450.2, subdivisions (a)(1) and (a)(2)(A).

[2] Title 22, California Code of Regulations, section 67450.3, subdivisions (a)(1) and (a)(3).

[3] Title 22, California Code of Regulations, section 67450.3, subdivision (a)(13).

[4] Title 22, California Code of Regulations, section 67450.3, subdivision (a)(13)(G).

> The TTU operation consists of two containers, approximately 20,000 gallons each that are used to separate oil from bilge water. Bilge water is pumped from the ship docked nearby and flows through fixed piping and/or hose to container #1, water enters container #1 at the top and is transferred to container #2 through a flexible hose. The water is withdrawn from container #1 from the bottom, which allows any oil that separates from the bilge water to stay in container #1. Container #2 is emptied as needed by a vacuum truck operated by South Bay. The water is taken to a pump station where it is discharged to the industrial sewer. The oil that accumulates in container #1 is recycled by a licensed oil recycler.

In June 1995, the same treatment processes that had previously been identified were listed on respondent's site-specific notification for the use of SBSB-1 at the 32nd Street Naval Station. Attached to that notification was a June 16, 1993 report from registered professional engineer Cecil M. Urlich from the firm of Dames & Moore describing the secondary containment system used in respondent's TTU. That letter included the same "TTU Description" that Williams had included in the earlier notification.

6. In July 1998, respondent submitted another site-specific notification for SBSB-1, this time for use at Southwest Marine. Although on one portion of the notification respondent checked boxes indicating that the treatment processes to be used were pH adjustment, phase separation, adsorption, and biological processes utilizing naturally occurring microorganisms, in the narrative description respondent listed only "gravity separation/chemical treatment." Attached to this notification was a letter from Southwest Marine's senior environmental coordinator in which she stated that "the gravity phase separation of this waste stream is currently the best available technology."

In July 1998, respondent also submitted to the department initial unit-specific notifications for three TTUs designated as SBSB-4, SBSB-5, and SBSB-6. On each of these notifications, which appear to simply be photocopies of a single notification, the same treatment process boxes were checked as on the July 1998 notification for SBSB-1. But in the narrative description portions of the notifications respondent listed only "gravity separation and/or demulsifier solution." At the same time, respondent submitted two site-specific notifications. The notifications for use of SBSB-4 at Continental Maritime/32nd Street Naval Station and for use of SBSB-6 at Continental Maritime/North Island Naval Station again had the same treatment process boxes checked. In the narrative description for SBSB-4 the only treatment process listed was gravity separation; for SBSB-6 both gravity separation and chemical treatment were listed. Attached to each of the site-specific notifications was a letter from Continental Maritime's environmental inspector in which he stated that "the gravity phase separation of this waste stream is currently the best available technology."

7. Each time respondent submitted a notification to the department it received in return an "Authorization to Operate a TTU under Permit by Rule." Each of those documents advised respondent that the authorization would expire one year from the date of the authorization letter. Some of the authorization letters further advised respondent that in order to renew the authorization, respondent must submit an annual unit-specific notification.

8. Respondent submitted no subsequent notifications to the department concerning any of these four TTUs after July 1998. Nor did respondent submit a required closure certificate for any of these units.

9. In 1998, Health and Safety Code section 25123.5, which defines "treatment" of hazardous wastes, was amended. Specifically exempted from the definition of treatment, and therefore no longer subject to regulation by the department, were "sieving or filtering liquid hazardous waste to remove solid fractions, without added heat, chemicals, or pressure," and "phase separation of hazardous waste . . . unaided by the addition of heat or chemicals."

10. Roger S. Gruben is respondent's vice-president and general manager. He has been employed there since August 1997. Gruben testified that at least since the time he started with the company, the tanks in which respondent collected bilge water (so-called Baker tanks) were not used as treatment units, but only as holding tanks, with the liquids contained in them either being pumped out via pipelines or trucked out to water treatment plants. Each of respondent's clients, he asserts, had their own National Pollution Discharge Elimination System (NPDES) or Fixed Treatment Unit (FTU) and Gruben believed respondent was operating under the clients' permits. Gruben testified that respondent obtained permits from the department "because the state said we needed them." Because the department encouraged permit applicants to list on their initial notifications all treatment processes that might be used, and in order to keep its options open because the Navy awarded contracts with little advance notice while the department required notifications to be submitted 45 days prior to treatment, respondent listed several treatment processes on its notifications even though the only process it actually used was filtration by gravity separation, also known as phase separation. Although respondent's TTU filings may have led the department to believe otherwise, that phase separation was the only process respondent used is supported by the "TTU Descriptions" submitted by respondent to the department in 1995 and 1998, the letters from Southwest Marine and Continental Maritime submitted to the department in 1998, and a letter submitted at the hearing from Continental Maritime's current environmental health and safety manager in which he states that respondent has not performed any activities for the company requiring TTUs since 1999, and that prior to that date "phase separation and gravity settling" were the only methods of treatment used by respondent.

Because phase separation was the only treatment method used by respondent, and because use of that treatment did not require a permit from the department after the 1998 amendment of Health and Safety Code section 25123.5, Gruben believed respondent was no longer subject to department regulation. As a result, Gruben believed that respondent was

therefore "good to go" and that there was no need to follow the closure procedures. Therefore, although respondent continued to use its Baker tanks on a few contracts with Southwest Marine, it filed nothing with the department after its permits expired in 1999, one year after they were last issued.

11. The Board of Equalization billed respondent annual fees for each of its TTUs.[5] Respondent paid those fees through 2001. On dates not established by the evidence, but apparently around 2001, respondent sold TTUs SBSB-1, SBSB-4, SBSB-5, and SBSB-6. Apparently because no closure certification was filed with the department, respondent continued to be billed fees for those units by the Board of Equalization.[6] It was because of these continued billings that in January 2004 respondent initiated contact with the department concerning the units it no longer owned. When the department determined that respondent had not followed proper closure procedures, it began the enforcement action that resulted in this hearing.

12. The department's position is that once a TTU is authorized to operate, it remains subject to the department's regulatory jurisdiction until it has been properly closed in accordance with the regulations. This is true even if the TTU was never actually used to treat hazardous waste or even if the unit's permit has expired.

Findings re: Penalty Determination

13. The department's regulations set forth the procedures to be followed in assessing administrative penalties in enforcement orders. Title 22, California Code of Regulations, section 66272.62, requires use of a penalty matrix, set forth in subdivision (d). One axis of the matrix is the "actual and potential harm" of the violation. The second axis is the "extent of deviation" of the violation. There are three degree-rating categories on each axis: major, moderate, and minimal. At each intersecting point on the matrix there are specified maximum, middle-range, and minimum penalties (in dollars). Absent "compelling circumstances," it is the department's practice to apply the middle-range penalty.

14. Based upon the type and volume of hazardous waste respondent was treating, the department determined the actual and potential harm of the violations to be minimal. It determined the extent of deviation of the violation to be major because, in the department's view, respondent showed a "total disregard" for any aspect of compliance with the closure requirements – respondent had no closure plan,[7] there was no closure of the TTUs, and no

[5] Respondent had six TTUs. It still has two active TTU units, SBSB-2 and SBSB-3. Like SBSB-4, SBSB-5 and SBSB-6, those two units were first permitted in July 1998.

[6] Respondent did not pay the fees for these subsequent years and in July 2004 the Board of Equalization filed a notice of levy. As a result of enforcement of that levy, all fees have been paid through 2004.

[7] Gruben asserted that respondent did have a closure plan. However no evidence of such a plan was presented. The department's complaint investigation report shows that it requested a copy of

closure certification was provided to the department.[8] The appropriate intersecting point on the matrix for minimal harm and major deviation shows a penalty range between $6,000 and $15,000. The department applied the middle-range penalty, $10,500, for each unit. To those penalties, the department then assessed an additional $3,000 per unit pursuant to the regulatory provision allowing a penalty to be increased "by the amount of any economic benefit gained by the violator as a result of noncompliance."[9]

The $3,000 per unit "economic benefit" was the department's estimation of the amount respondent saved by not having a registered professional engineer inspect the units and certify their closure. Dr. Sangat Kals, a supervising hazardous substances scientist with the department, testified that the $3,000 figure was based upon "past experience" in "dozens of cases" involving both TTUs and FTUs. However, the department presented no evidence to verify that a registered professional engineer would in fact charge $3,000 per unit to inspect a TTU and certify it for closure.[10] Respondent presented hearsay evidence of a proposal from a registered professional engineer who estimated the cost of a closure plan review at $150, the cost of a certification letter at $150, and inspection of the TTUs at a cost of $75 per hour. Gruben asserts that inspection of all four units probably would have taken no more than four hours.

15. Gruben testified that because of decreased ship maintenance being performed on naval vessels because of the Iraq war, respondent's profits are down significantly. An unaudited profit and loss statement for the first quarter of 2005 shows a net loss of $186,295.

16. Respondent has offered to have the four TTUs that it sold inspected and closed out in accordance with the department's regulations. However, the department does not see this as a viable option. Dr. Kals noted that the regulations include certain timelines for closure, with which respondent cannot now comply; that whatever hazardous wastes respondent may have treated in the units cannot now be traced several years after the units

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respondent's closure plan on February 24, 2004. But nothing in the report indicates such a plan was ever provided.

[8] Factors to be considered in rating the degree of actual and potential harm and extent of deviation of a violation are found in title 22, California Code of Regulations, section 66272.62, subdivisions (b)(2) and (c)(2).

[9] Title 22, California Code of Regulations, section 66272.63, subdivision (c).

[10] Although the department asserts that in a similar recent case involving failure to properly close three TTUs (Hydrochem Industrial Services, Inc.), the permit holder provided an invoice showing a closure fee of $2,300, the consent order in that case does not specify this amount and only hearsay evidence was presented to support it. And as respondent points out, there is no way to determine from the consent order what kinds of hazardous wastes Hydrochem was treating and whether, therefore, the closure costs were comparable to those respondent might have incurred.

were sold; and that any potential damage that might have been caused by the units not being properly closed before they were sold cannot now be reversed.

LEGAL CONCLUSIONS

Violations

1. As alleged in the department's enforcement order, respondent violated title 22, California Code of Regulations, section 67450.3, subdivision (a)(13)(G), by failing to submit certifications signed by the permit holder and by an independent, professional engineer registered in California, that closure of TTUs SBSB-1, SBSB-4, SBSB-5, and SBSB-6 had been completed in accordance with a written closure plan that meets the applicable requirements.

2. Respondent acknowledged that no closure certifications were submitted. However, it sought to excuse this failure because of the belief, as set forth in Finding 10, that its TTUs were no longer subject to the department's oversight after the 1998 amendment of Health and Safety Code section 25123.5. This belief was not entirely unreasonable. Respondent knew that phase separation, the only treatment method it used, became exempt from the department's regulation pursuant to the 1998 amendment. And it knew that its TTU authorizations expired in mid-1999, one year after they were issued. Feeling that it was therefore "good to go," respondent did not thereafter seek to renew its TTU permits. Under the circumstances, respondent cannot be faulted for not renewing its permits. But it can be faulted for its failure to file closure certifications for the TTUs. Respondent knew that in obtaining permits to handle hazardous wastes it had become involved in a very highly regulated field, governed by extremely technical and complex laws and regulations. Respondent apparently knew that those regulations required it to have closure plans for its TTUs. (Gruben testified that closure plans did, in fact, exist.) Yet it essentially walked away from the department's oversight without following the closure procedures. The regulatory scheme involved demonstrates that the department's assertion is correct: once a treatment unit is authorized to operate, it remains subject to the department's regulatory jurisdiction until it has been properly closed in accordance with the regulations. This is true even if the TTU was not actually being used for treatments subject to the department's jurisdiction or even if the unit's permits had been expired. Thus, respondent's failure to follow the closure procedures constituted a violation of the regulations.

Penalty

3. The department adjudged the actual and potential harm of respondent's violations to be at the lowest level: minimal. On the other hand, it judged the extent of deviation of the violations to be at the highest level: major. Title 22, California Code of Regulations, section 66272.62, subdivision (c)(2)(A), provides that an act is deemed to be a major deviation if "the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some its provisions are not complied with." Here, regardless of whether or not respondent

"completely ignored" the closure requirements, the function of those requirements was certainly "rendered ineffective" because of respondent's failure to comply. The obvious purpose of the closure procedures, which include the requirement of inspection and certification by a registered professional engineer, is to protect the public by insuring that units that had been used to treat hazardous wastes have been properly decontaminated and are therefore safe for alternative uses.[11] Because so much time has passed since respondent stopped using and sold the TTUs, it would be impossible to determine now whether the units were properly decontaminated. Thus, the function of the closure requirements was rendered ineffective by respondent's failure to comply. The department's finding of a major deviation was therefore justified.

4. Accordingly, the department properly determined that the appropriate penalty range for each violation was between $6,000 and $15,000. The department did not abuse its discretion in choosing the mid-point of this range, $10,500, as the initial penalty for each violation, resulting in a total initial penalty of $42,000. Title 22, California Code of Regulations, section 66272.63, subdivision (a), provides that the initial penalty is subject to adjustment based upon the violator's intent. A downward adjustment of zero to 50 percent should be made if the "violation occurred even though good faith efforts to comply with [the] regulations were made." No adjustment should be made if the "violation indicated neither good faith efforts nor intentional failure to comply." That no adjustment was made in this case indicates the department found neither good faith efforts nor intentional failure to comply. This too is justified. Although respondent's belief that it was no longer subject to the department's jurisdiction after the 1988 statutory amendment and the 1999 expiration of its TTU permits was not unreasonable, this does not demonstrate a good faith effort to comply with the regulations. In fact, no effort to comply was made. Respondent is not entitled to a downward adjustment of the initial penalty of $42,000.

5. As indicated in Finding 14, subdivision (c) of section 66272.62 permits a penalty to be increased to account for any economic benefit gained by noncompliance. The department thereby increased the total penalty by $12,000, or $3,000 per unit. This increase was not supported by the evidence. The department has the burden of proving that its penalty determination was reasonable. But the department submitted nothing more than hearsay evidence to support its view of the amount respondent saved by not having its TTUs inspected and certified. This is insufficient evidence upon which to uphold the department's determination. Respondent's claim that the cost it would have incurred for inspection and certification would be less than $500 per unit was similarly supported only by hearsay evidence. However, there is no question that respondent saved money by not having its units inspected and $500 per unit is found to be a reasonable minimum cost saving. Accordingly, the penalty increase due to economic benefit is reduced to $500 per unit, or $2,000 in total.

[11] See title 22, California Code of Regulations, section 67450.2, subdivisions (a)(13)(B)(2) and (a)(13)(D).

6. Based upon the matters set forth in Legal Conclusions 4 and 5, the penalty assessed against respondent is reduced to $11,000 per unit, for a total penalty of $44,000.

7. Title 22, California Code of Regulations, section 66272.68, subdivision (d), provides that if a violator has provided the department with financial information necessary to assess the violator's ability to pay, payment of the full penalty may be extended over a period of time if immediate, full payment would cause extreme financial hardship. Further, if extending payment over a period of time would cause extreme financial hardship, the penalty may be reduced.

The evidence presented by respondent of its current financial situation is sufficient to justify a determination that immediate, full payment would cause extreme financial hardship. It is insufficient, however, to justify a determination warranting a reduction in penalty. Accordingly, the department shall permit respondent to pay the full penalty over a period of time to be determined by the department.

ORDER

The administrative penalty imposed upon respondent South Bay Sand Blasting and Tank Cleaning, Inc., in the enforcement order in Docket HWCA 20040509 is reduced to $44,000. Respondent shall be permitted to pay the full penalty over a period of time to be determined by the department. In all other respects, the enforcement order is sustained.

DATED: May 9, 2005

Original signed by Michael C. Cohn
MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings